

Service Date: March 20, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

IN THE MATTER OF the Application of)	UTILITY DIVISION
U S WEST Communications, Inc. and)	
CRJ Communications, Inc. Pursuant to)	DOCKET NO. D98.1.7
Section 252(e) of the Telecommunications)	
Act of 1996 for Approval of their)	ORDER NO. 6060
Interconnection Agreement)	

FINAL ORDER APPROVING INTERCONNECTION AGREEMENT

I. Introduction and Procedural Background

1. On February 8, 1996, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (the "1996 Act") was signed into law, ushering in a sweeping reform of the telecommunications industry that is intended to bring competition to the local exchange telecommunications markets. The 1996 Act requires companies like U S WEST Communications, Inc. (U S WEST) to negotiate agreements with new competitive entrants in their local exchange markets. 47 U.S.C. 251(c) and 252(a).

2. U S WEST and CRJ Communications, Inc. (CRJ) negotiated an interconnection contract after CRJ requested contract negotiations. The agreement is entitled "Interconnection Agreement" (Agreement).

3. CRJ submitted the interconnection agreement to the Montana Public Service Commission (Commission) for approval on January 22, 1998. The Agreement was reached through voluntary negotiations and requires Commission approval prior to implementation pursuant to 47 U.S.C. • 252(e). The Commission must approve or reject the Agreement no later than April 22, 1998, 90 days following the request for approval, or it will be deemed approved.

47 U.S.C. • 252(e)(4).

4. On January 27, 1998, the Commission issued a Notice of Application and Notice of Opportunity to Intervene and Comment. The Notice established February 6, 1998 as the deadline for intervention and limited intervenors to addressing the grounds for Commission action identified in Section 252(e)(2)(A) of the Act. The Notice stated that no public hearing was contemplated by the Commission unless requested by an interested party by February 6, 1998. The Notice further stated that comments were required to be filed no later than February 18, 1998. The Commission's public notice also advised interested parties in the geographic areas affected by the Agreement that intervention in

the proceeding was limited and that the Montana Consumer Counsel (MCC), the only intervenor permitted, could be contacted to represent consumer interests.

5. Rather than negotiate a separate interconnection agreement with U S WEST, CRJ elected to opt into the wireline Interconnection Agreement between Montana Wireless, Inc.(Montana Wireless) and U S WEST that was approved by the Commission on December 1, 1997. As part of the materials submitted with its Application, CRJ included a copy of the parties' signed "Agreement to Adopt Interconnection Agreement," which is evidence of its intent to adopt the Montana Wireless/U S WEST agreement in its entirety. Upon review of the Agreement, the Commission makes the following findings, conclusions and order.

II. Applicable Law and Commission Decision

6. The Interconnection Agreement between U S WEST and CRJ provides for, interalia, interconnection by means of collocation, entrance facilities or meet point arrangements; the exchange of traffic between U S WEST and CRJ; compensation for transportation and termination of such traffic; the purchase of U S WEST's retail services for resale; the acquisition of unbundled network elements from U S WEST; CRJ customer access to operator assistance, directory assistance and E911 service; access to operational support systems and myriad other arrangements necessary for CRJ's provision of competitive local exchange services in Montana.

7. CRJ has elected to opt into the Montana Wireless/U S WEST wireline Interconnection Agreement, which the Commission approved on December 1, 1997, and amended on January 13, 1998.

8. The Commission must approve or reject the parties' Agreement, with written findings as to any deficiencies, no later than April 22, 1998. 47 U.S.C. • 252(e)(1) and (4). Section 252(e)(2)(A) limits the grounds for rejection of an agreement reached by voluntary negotiation:

(2) GROUNDS FOR REJECTION - The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under [47 U.S.C. • 252(A)] if it finds that:

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.

9. Notwithstanding the limited grounds for rejection in 47 U.S.C. • 252(e)(2)(A), the Commission's authority is preserved in • 252(e)(3) to establish or enforce other requirements of state law in its review of arbitrated or negotiated agreements, including requiring compliance with state telecommunications service quality standards or requirements. Such compliance is subject to • 253 of the 1996 Act which does not allow states to permit or impose any statutes, regulations, or legal requirements that prohibit or have the effect of prohibiting market entry.

10. Unlike an agreement reached by arbitration, a voluntarily negotiated agreement need not comply with standards set forth in Section 251(b) and (c). Significantly, standards set forth in • 251(c) and which this Agreement may have been negotiated "without regard to" include the following:

(c) ADDITIONAL OBLIGATIONS OF INCUMBENT LOCAL EXCHANGE CARRIERS. -- In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(2) INTERCONNECTION.--The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carriers' network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate or any other party to which the carrier provides interconnection; and

(D) on rates, terms and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. 47 U.S.C. • 251(c). This section and • 252(a)(1) of the Act permit parties to agree to rates, terms and conditions for interconnection that may not be deemed just, reasonable and nondiscriminatory, and which are not determined according to the pricing standards included in • 252(c) of the Act, as would be required in the case of arbitrated rates set by the Commission. By approving the Agreement, the Commission does not intend to imply that it approves of all the terms and conditions included in the Agreement and makes no findings herein on the appropriateness of many of the terms and conditions. Our interpretation of the 1996 Act is that • 252(a) and (c) prevent the Commission from addressing such issues in this proceeding.

11. When parties execute an interconnection agreement and one or both parties submit it to the Commission for approval, the Commission must approve or reject it (in whole or in part) according to the standards in • 252 of the 1996 Act--to determine if it discriminates against a carrier not a party to the agreement or is inconsistent with the public interest, convenience and necessity. The

Commission can reject portions of the agreement, but it cannot require additional provisions. If the Commission does not act within 90 days of submission to approve or reject the Agreement, the Agreement will go into effect as is on April 22, 1998, and be deemed approved.

12. As with the Montana Wireless/U S WEST Agreement, adopted by CRJ, the Commission finds that the terms in the parties' Agreement appear to conform to the standards required by the 1996 Act, with the exception of the contract provisions described and rejected below. The terms are the same as those terms in the Montana Wireless/U S WEST Agreement, which the Commission approved on December 1, 1997. Similarly, this Agreement raises certain concerns as described below.

13. The Commission rejects the following terms:

a. Dispute Resolution - Section 26.18.2 (p. 86) sets forth the parties' agreement pertaining to resolution of claims, controversies or other disputes which cannot be settled through negotiation. It provides that such disputes be resolved by arbitration conducted by a single arbitrator, who is an attorney, under the rules of the American Arbitration Association, and that the arbitrator's award shall be final and binding and may be entered in any court having jurisdiction thereof. While the parties are free to provide for dispute resolution in this manner according to the 1996 Act, the resolution arrived at by the arbitrator may not be consistent with the public interest, convenience and necessity. The Commission concludes that this contract provision should be rejected because it does not provide for notification to the Commission of issues to be arbitrated or of the subsequent decision reached by the arbitrator. The public interest and the facilitation of market entry is better served by such notification. The parties may amend this section of the Agreement to include this language.

b. Payment - Section 11.10 sets forth in detail the provisions for payment to U S WEST by CRJ. It provides for suspension of the provision during the initial three months of the Agreement and for three billing cycles. According to • 11.10.5, CRJ's payment to U S WEST, if not made pursuant to the terms of this section, could place the CRJ's end user customers' services in jeopardy of being disconnected through no fault on their part. This section contains no provision for notification to the Commission of a pending disconnection of service to an indeterminable number of end users. U S WEST must follow certain Commission rules prior to terminating service to its own end users--as must CRJ. If notified of a pending termination of service to CRJ's customers, the Commission can act appropriately. It is not consistent with the public interest to permit U S WEST to terminate service to CRJ's end users with no notification to the Commission. The Commission rejects • 11.10.5 of the Agreement. The parties may amend this section of the Agreement to include a notification provision that allows for a reasonable notification to the Commission that will afford the Commission time to take any appropriate action to protect end users.

c. Construction - Section 11.5.7 of the Wireline Agreement (p. 62) states:

Resold services are available only where facilities currently exist and are capable of providing such services without construction of additional facilities

or enhancement of existing facilities. However, if MWI requests that facilities be constructed or enhanced to provide resold services, USWC will review such requests on a case-by-case basis and determine, in its sole discretion, if it is economically feasible for USWC to build or enhance facilities. If USWC decides to build or enhance the requested facilities, USWC will develop and provide to MWI a price quote for the construction. If the quote is accepted, MWI will be billed the quoted price and construction will commence after receipt of payment.

The Commission finds that this provision could conflict with the public interest and should be rejected. There may be circumstances where U S WEST is required by law to construct facilities.

The parties may agree to the terms in Section 11.5.7 for instances where U S WEST is not required to construct facilities, but the Commission rejects this section as presently written because it does not consider those instances where U S WEST might be required by law to construct facilities. The parties may amend this section of the Agreement to so provide.

d. Regulatory Approval -- The first sentence in • 26.31 (p. 89) states: "The Parties understand and agree that this Agreement will be filed with the Commission and may thereafter be filed with the FCC and shall, at all times, be subject to review by the Commission or the FCC." (Emphasis added.) The 1996 Act provides for review by state commissions only. See 47 U.S.C. • 252. Although the FCC concocted an interpretation of the Act by which it intended to establish a federal review process under its • 208 complaint process, this interpretation was invalidated by the Court in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 803-04 (8th Cir. 1997). These are intrastate telecommunications matters under the exclusive review of state commissions. *Id.*, at 804. As such, the inclusion of the FCC is not appropriate and, therefore, the Commission rejects this provision.

14. The Commission further notes that the sections just discussed have appeared in other interconnection agreements in Montana and have been rejected by the Commission. U S WEST's persistence in using these terms despite their continued rejection creates additional work for the Commission, its staff, and the parties to the agreements. Once a contract provision is rejected, and the reasons for the rejection are explained, the provision should not be included in future agreements. This will lessen the need for further amendments to the agreements and will expedite resellers market entry.

III. Conclusions of Law

1. The Commission has authority to supervise, regulate, and control public utilities. See • 69-3-102, MCA. U S WEST is a public utility offering regulated telecommunication services in the State of Montana and CRJ will be regulated when it provides the same. See • 69-3-101, MCA.

2. The Commission has authority to do all things necessary and convenient in the exercise of the powers granted to it by the Montana Legislature and to regulate the mode and manner of all investigations and hearings of public utilities and other parties before it. See • 69-3-103, MCA.

3. The Commission has jurisdiction to approve or reject the interconnection agreements (or portions thereof) negotiated between CRJ and U S WEST and submitted to the Commission according to the standards set forth in 47 U.S. • 252(e)(2)(A). Section 69-3-103, MCA.

4. The United States Congress enacted the Telecommunications Act of 1996 to encourage competition in the telecommunications industry. Congress gave responsibility for much of the implementation of the 1996 Act to the State, to be handled by the State agency with regulatory control over telecommunication carriers. See, generally, the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (amending scattered sections of the Communications Act of 1934, 47 U.S.C. •• 151, et seq.). The Montana Public Service Commission is the State agency charged with regulating telecommunications carriers in Montana and properly exercises jurisdiction in this docket pursuant to Title 69, Chapter 3, MCA.

5. Adequate public notice and an opportunity to be heard has been provided to all interested parties in this docket, as required by the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA.

6. Section 252(e)(4) of the 1996 Act provides that negotiated agreements submitted for a state commission's approval must be approved or rejected within ninety (90) days or they will be deemed approved. Thus, Commission approval or rejection according to the standards set forth in the 1996 Act must issue by April 22, 1998, 90 days following submission of the CRJ/U S WEST Agreements for Commission approval.

7. The Commission must approve these interconnection Agreements pursuant to the requirements of federal law set forth in 47 U.S.C. • 252. Section 252(e) limits the Commission's review of negotiated agreements to the standards set forth therein for rejection of such agreements. IV. Order

THEREFORE, based upon the foregoing, it is ORDERED that the Interconnection Agreement between U S WEST Communications, Inc. and CRJ Communications, and Amendment No. 1 to that Agreement, are approved as discussed herein, subject to the following conditions:

1. Within 14 days of service of this order the parties may file an amendment to the Agreement consistent with the Commission's decision in this proceeding.

2. The parties shall file subsequent amendments to their Agreement with the Commission for approval pursuant to the 1996 Act.

3. The Commission approves Amendment No. 1 to the Agreement by incorporating and adopting by reference its Order No. 6031a, Docket No. D97.9.168, where the Commission approved, with qualifications, Amendment No. 1 to the Agreement between U S WEST and Montana Wireless.

DONE AND DATED this 16th day of March, 1998, by a vote of 4-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

"

"

"

"

DAVE FISHER, Chairman

NANCY MCCAFFREE, Vice Chair

BOB ANDERSON, Commissioner

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.